No. 11-1898

United States Court of Appeals

for the

Eighth Circuit

TOM BRADY, *et al.*,

Plaintiffs-Appellees,

– v. –

NATIONAL FOOTBALL LEAGUE, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
OF MINNEAPOLIS, MINNESOTA, NO. 0:11-CV-00639-SRN,
HONORABLE SUSAN RICHARD NELSON

MOTION FOR LEAVE TO APPEAR AND FILE AN *AMICUS CURIAE* BRIEF ON BEHALF OF THE NATIONAL HOCKEY LEAGUE IN SUPPORT OF THE APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Hockey League ("NHL") respectfully requests leave of the Court to file the attached brief amicus curiae in support of Appellants, and in support thereof states as follows:

The NHL has a direct interest in ensuring that the determination of terms and conditions of employment for NHL players is the product of a bona fide labor process rather than the "lever" of potential antitrust liability. This is especially true in the context of the stable and mature collective bargaining relationship that the NHL and the National Hockey League Players' Association ("NHLPA") have had for nearly 45 years. Yet, under the district court's decision and rationale, a group of employees can, at any time and for any reason, insinuate the antitrust laws into the dynamics pursuant to which new terms and conditions of employment are negotiated and determined. All a union has to do is have its members "disclaim" union representation, simultaneously reconstitute itself as an employee "association," and then ask the court to immediately enjoin any joint labor activity of the employers (*e.g.*, including the implementation of a lawful lockout) by filing a treble damages antitrust complaint and a motion for preliminary injunction. The NHL respectfully submits that this cannot be the state of the law.

Left to stand, the district court's ruling creates a perverse incentive for unions – during the collective bargaining process and in the midst of negotiations – to divert their efforts to antitrust litigation tactics rather than complying with their obligations under federal labor law to bargain in good faith. The net effect is that traditional economic weapons contemplated and made available in the labor process – employee strikes and employer lockouts – are removed as options. In turn, the labor process is necessarily subjugated to antitrust law and related litigation tactics. Indeed, under the district court's ruling, union disclaimer and simultaneous antitrust suits are likely to be the chosen path any time employee-players (or other unions or associations of employees for that matter) believe that these tactics are the most viable method of obtaining the terms and conditions of employment they desire, but might not achieve through the traditional collective bargaining process.

The NHL and NHLPA have together established a collective bargaining relationship that they have now maintained uninterrupted since 1967. The NHL's historical experience with the NHLPA has been to negotiate and determine terms and conditions of employment exclusively through the traditional collective bargaining process, which has been characterized by hard, good-faith negotiations in the context of a bona fide labor process (with all the rights and obligations that that process entails). From time to time, this has included resort to

the economic weapons of an employee strike or an employer lockout that the labor laws expressly contemplate and endorse.

The current CBA expires in 2012, and while the facts and circumstances may differ as between our league and the NFL, the issues presented on this appeal are of central importance to the NHL and to all participants in collective bargaining relationships in the United States. As the courts have made clear, including the Supreme Court in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("*Brown*"), terms and conditions of employment should be the product of good-faith bargaining, including the potential use of labor weapons available to both employers and employees. The antitrust laws and the threat of antitrust-based injunctive relief or treble damage liability should not be part of that process, and certainly not while employees are working together in any fashion as an association of employees to affect terms and conditions of employment (such as in the lawsuit here). Yet, under the district court's ruling and rationale, the entire governing body of labor law can be tactically jettisoned – supplanted completely by the antitrust laws in what clearly remains a labor dispute – by employees and/or their union at any time.

The NHL respectfully submits that consideration of the attached amicus brief will assist the Court in this case in assessing the critical importance of the legal issues presented and the potentially vast negative consequences of the

district court's decision, which will extend far beyond the scope of this particular dispute.

Dated: May 9, 2011

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the NHL hereby certifies that it has no parent corporation, and that it is a joint venture of thirty NHL Member Clubs organized as an unincorporated not-for-profit association. The following public companies own at least 10 percent of an NHL Member Club as of May 9, 2011:

Company	**NHL Member Club for Which Company Owns at Least 10%**
Time Warner, Inc.	Atlanta Thrashers
The Madison Square Garden Company	New York Rangers
Comcast Corporation	Philadelphia Flyers
BCE, Inc.	Montreal Canadiens
The Toronto Dominion Bank	Toronto Maple Leafs

Dated: May 9, 2011

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INTEREST OF AMICUS

The National Hockey League ("NHL") has a direct interest in ensuring that the determination of terms and conditions of employment for NHL players is the product of a bona fide labor process rather than the "lever" of potential antitrust liability. This is especially true in the context of the stable and mature collective bargaining relationship that the NHL and the National Hockey League Players' Association ("NHLPA") have had for nearly 45 years. Yet, under the district court's decision and rationale, a group of employees can, at any time and for any reason, insinuate the antitrust laws into the dynamics pursuant to which new terms and conditions of employment are negotiated and determined. All a union has to do is have its members "disclaim" union representation, simultaneously reconstitute itself as an employee "association," and then ask the court to immediately enjoin any joint labor activity of the employers (*e.g.*, including the implementation of a lawful lockout) by filing a treble damages antitrust complaint and a motion for preliminary injunction. The NHL respectfully submits that this cannot be the state of the law.

Left to stand, the district court's ruling creates a perverse incentive for unions – during the collective bargaining process and in the midst of negotiations – to divert their efforts to antitrust litigation tactics rather than complying with their obligations under federal labor law to bargain in good faith. The net effect is that

traditional economic weapons contemplated and made available in the labor process – employee strikes and employer lockouts – are removed as options. In turn, the labor process is necessarily subjugated to antitrust law and related litigation tactics. Indeed, under the district court's ruling, union disclaimer and simultaneous antitrust suits are likely to be the chosen path any time employee-players (or other unions or associations of employees for that matter) believe that these tactics are the most viable method of obtaining the terms and conditions of employment they desire, but might not achieve through the traditional collective bargaining process.

The NHL and NHLPA have together established a collective bargaining relationship that they have now maintained uninterrupted since 1967. The NHL's historical experience with the NHLPA has been to negotiate and determine terms and conditions of employment exclusively through the traditional collective bargaining process, which has been characterized by hard, good-faith negotiations in the context of a bona fide labor process (with all the rights and obligations that that process entails). From time to time, this has included resort to the economic weapons of an employee strike or an employer lockout that the labor laws expressly contemplate and endorse.

In 1992, NHL players struck at the end of the NHL's regular season and quickly achieved a negotiated settlement with the NHL Clubs that resulted in

the resumption of the regular season and playoffs. In 1994-95, the NHL owners imposed a lockout at the beginning of the regular season that lasted 102 days and culminated in a shortened schedule for that season and a successor collective bargaining agreement ("CBA"). Then in 2004-05, NHL owners and players lost a full season (regular season and playoffs) to an owners' lockout before a new CBA was reached and play was resumed for the 2005-06 season. In each of these three instances, the labor disputes between the parties ultimately were settled and resolved through the negotiation of new CBAs by and between the players' collective bargaining representative, the NHLPA, on the one hand, and the NHL, as the multi-employer bargaining representative for the NHL Clubs, on the other.

The current CBA expires in 2012, and while the facts and circumstances may differ as between our league and the NFL, the issues presented on this appeal are of central importance to the NHL. As the courts have made clear, including the Supreme Court in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("*Brown*"), terms and conditions of employment should be the product of good-faith bargaining, including the potential use of labor weapons available to both employers and employees. The antitrust laws and the threat of antitrust-based injunctive relief or treble damage liability should not be part of that process, and certainly not while employees are working together in any fashion as an association of employees to affect terms and conditions of employment (such as in

the lawsuit here). Yet, under the district court's ruling and rationale, the entire governing body of labor law can be tactically jettisoned – supplanted completely by the antitrust laws in what clearly remains a labor dispute – by employees and/or their union at any time.

Pursuant to Federal Rule of Appellate Procedure 29, the source of the NHL's authority to file this amicus brief derives from this Court's grant of its Motion to File Amicus Curiae Brief (being filed together with this brief pursuant to Federal Rule of Appellate Procedure 29(b)). Counsel for the NHL authored this brief in its entirety. Neither the NFL, its counsel, nor any other person (other than the NHL, its members or its counsel) has contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has made clear, on multiple occasions, that the antitrust laws should not apply so as to interfere with federal labor law or the collective bargaining process to which that body of law relates. That limiting principle, articulated and applied in *Brown* in the context of bargaining impasse and the non-statutory labor exemption, should have been (but was not) similarly applied here in the case of disclaimer by the National Football League Players Association ("NFLPA") and the adoption of a labor/collective bargaining strategy that employs and features antitrust litigation. By ignoring this principle and

permitting the intrusion of antitrust laws into this labor dispute, the district court's decision threatens to fundamentally alter the critical balance, highlighted in *Brown*, favoring application of the labor laws (rather than the antitrust laws) to all matters sufficiently close in time and in circumstances to the collective bargaining process (*i.e.*, after impasse and the use of available labor weapons). Indeed, under the district court's holding, a union – in any industry – in the midst of collective bargaining negotiations (including prior to impasse) could at any time invoke the lever of the antitrust laws as an admitted tactic to obtain better terms and conditions of employment.

Because "disclaimer" can be manipulated and invoked at any time under the lower court's rationale, the decision below also threatens the application of the non-statutory labor exemption and the careful "time and circumstances" prescription articulated in *Brown*. Under the district court's formulation, a union may attempt to remove itself from the labor law context altogether by having its members "disclaim" the union as their bargaining representative, simultaneously reform as an "association" of employees and file an antitrust suit. Through this tactic, a union could turn itself – and the threat of treble damages in the negotiation process – off and on like a "switch." In blessing such a tactic, the district court fails to account for the Supreme Court's admonition that antitrust laws should not be available as a lever for a group of employees to obtain better terms and

conditions of employment – a principle that is no less applicable to an association of employees than to a formal union. Unions that find themselves unable to obtain their desired terms and conditions through collective bargaining are sure to pursue a similar path to the antitrust courts in the future.

The lower court's failure to recognize the labor policy implications of the issues before it also results in overly narrow interpretations of labor law itself. For example, in the light of labor law policy contemplating and endorsing the use of the economic tools of strikes and lockouts, it is clear that the Norris-LaGuardia Act ("NLA" or the "Act") – by its terms and as a matter of sound statutory construction – applies to any "association of employees," whether a union or otherwise. In order for the district court to find that the labor laws are not even relevant to the post-disclaimer relationship between the NFL and the NFLPA – admittedly an association of player-employees – it not only had to interpret the statute too narrowly (contrary to overwhelming Supreme Court precedent), but also had to take the affirmative misstep of reading the word "union" into the statute in place of "association of employees." Once that clear legal error is corrected, the district court's decision collapses under the weight of established labor law.

Likewise, even had it correctly acknowledged that the lockout "grow[s] out of a labor dispute," the lower court still could not have met the mandatory requirements of Section 7 of the NLA (29 U.S.C. § 107) ("Section 7")

to issue an injunction. Under existing precedent, as well as the implied repeal doctrine, a lockout that is permitted by the labor laws as a valid "economic weapon" cannot simultaneously provide the predicate "unlawful act" for purposes of Section 7 as an antitrust violation; to suggest otherwise would mean that an exercise of a lawful regulatory right can itself still be an antitrust violation, something the implied repeal doctrine prohibits.

In sum, as plainly evidenced by the district court's opinion, the court eschews fundamental labor policy altogether, instead directly elevating and injecting the threat of antitrust liability into the bargaining process itself – even when the parties involved were not yet at impasse. This approach is fundamentally inconsistent with the balance struck in *Brown* between labor policy and law and the antitrust laws.

ARGUMENT

I. THE SUPREME COURT HAS MADE CLEAR THAT THE ANTITRUST LAWS SHOULD NOT INTERFERE WITH THE LABOR PROCESS

The Supreme Court in *Brown* recognized that the imposition of antitrust laws into the labor field threatened to do considerable harm to the collective bargaining process:

> [T]o give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on

> competition imposed through the bargaining process must be shielded from antitrust sanctions.

Brown, 518 U.S. at 237.

This policy consideration, reaffirmed by the Supreme Court on other occasions, is essential to any consideration of the application of antitrust laws in the labor context. *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) ("goals" of federal labor law could "never" be achieved if anticompetitive effects of collective bargaining were held to violate antitrust laws); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (the court "must consider the subject matter of [an] agreement in the light of the national labor policy" in order to determine whether that agreement is immune from attack by the antitrust laws), *United Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965) (exemption from antitrust laws necessary to "harmoniz[e]" those laws with national labor policies promoting negotiated resolution of disputes).

Accordingly, the antitrust laws should not function to "'subvert fundamental principles of our federal labor policy.'" *NBA v. Williams*, 45 F.3d 684, 690 (2d Cir. 1995) (quoting *Wood v. NBA*, 809 F.2d 954, 959 (2d Cir. 1987)); *id.* at 693-94 (holding that non-statutory labor exemption precluded antitrust liability for employers). And when issues regarding the "balancing of the conflicting legitimate interests" in the labor field arise, courts are directed to leave the "function of striking that balance to effectuate national labor policy . . . primarily

to the [NLRB], subject to limited judicial review." *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 96 (1957); *see also Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 241 (7th Cir. 1996) (where Plaintiff could have brought complaint to the NLRB, the court would not, in the context of an antitrust suit, "scrutinize the labor relations of a firm and determine which steps were unreasonable"); *Clune v. Publishers' Ass'n of N.Y.C.*, 214 F. Supp. 520, 527 (S.D.N.Y. 1963) (question of whether lockout by employers was unfair labor practice and "exceeded permissible bounds of defensive conduct" left to NLRB), *aff'd* 314 F.2d 343 (2d Cir. 1963). As this court has similarly concluded, permitting an antitrust suit in the labor context "would . . . improperly upset the careful balance established by Congress through the labor law." *Powell v. NFL*, 930 F.2d 1293, 1302 (8th Cir. 1989) ("*Powell II*"). The district court in that same case determined that "it would be highly destructive to collective bargaining if major issues could be removed from the bargaining table and preliminarily resolved in isolation in antitrust litigation." *Powell v. NFL*, 690 F. Supp. 812, 817 (D. Minn. 1988) ("*Powell I*"). This is the policy prism through which all of the legal issues raised in this case must be viewed.[1]

[1] These policy considerations transcend the particular facts of this case and may be implicated by many other factual circumstances that could arise in a particular labor dispute.

II. THE DECISION BELOW IS IN CONFLICT WITH THE LABOR POLICIES ARTICULATED IN *BROWN*

The NHL is concerned that, if left to stand, the lower court's opinion and rationale concerning the consequences of a "disclaimer" may threaten the continued viability of the non-statutory labor exemption – including even *before* a bargaining impasse is reached – that was so clearly explicated and endorsed in *Brown*. In fact, the tactical use of disclaimer is precisely the type of manipulation of the labor process that the *Brown* Court warned could undermine the entire regime of the collective bargaining process.

A. The *Brown* Court Attempted to Preclude the Manipulation of the Labor Process through Antitrust Litigation

In *Brown*, the Supreme Court was presented directly with the question of whether the non-statutory labor exemption expired at impasse.[2] After articulating various principles and citing previous Supreme Court cases urging caution in the application of the antitrust laws in the labor field, the Court declined to use impasse as a trigger for ending the non-statutory labor exemption. In arriving at this decision, the Supreme Court relied on the fact that impasse could be "manipulated by the parties for bargaining purposes," *Brown*, 518 U.S. at 246, and

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[2] The non-statutory labor exemption is applied by courts "where needed to make the collective-bargaining process work," – *i.e.*, by "substitut[ing] legislative and administrative labor-related determinations for judicial antitrust-related

(cont'd)

recognized the practical difficulties that drawing such a line would create for parties in a collective bargaining setting. *See id.* ("Consider, too, the adverse consequences that flow from failing to guess how an *antitrust* court would later draw the impasse line.").

In order to promote federal labor policy, the Court explained that agreements among employers would be subject to antitrust scrutiny only when they are "sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." *Id.* at 250. The Court specifically found that the conduct at issue in *Brown* "took place *during and immediately after a collective-bargaining negotiation*" and "grew out of, and was directly related to, the lawful operation of the bargaining process," *id.* (emphasis added); therefore, the non-statutory labor exemption continued to apply. These standards unquestionably were intended to promote federal labor policy and the collective bargaining process. Specifically, by requiring that a sufficient distance exist between that process and the termination of the non-statutory labor exemption, the Court adhered to its stated principles and guaranteed that "manipulation" of the

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determinations as to the appropriate limits of industrial conflict." *Brown*, 518 U.S. at 234, 237.

negotiating process would not be used improperly to inject antitrust law into the labor realm.

B. The District Court's Decision Undermines the Guiding Policy Principles of *Brown* and Potentially the Application of the Non-Statutory Labor Exemption Itself

The rationale underlying the district court's ruling below has the serious potential to render the non-statutory labor exemption a dead letter, whether immediately following or even prior to impasse – which the NFL and the NFLPA had not even reached. Indeed, if a union can take itself completely outside the reach of the labor laws by disclaiming in the midst of negotiations, then the labor law requirement to bargain in good faith, as well as scrutiny of the permanency of any impasse, would become academic. From this perspective, treating something as easily manipulated as the NFLPA's disclaimer – which "took place during and immediately after a collective-bargaining negotiation" – as the end-point for the non-statutory labor exemption is inconsistent with both the policies and holding of *Brown*.

This Court, therefore, should make clear that a "labor relationship" does not automatically end upon disclaimer, as the district court suggests here. Instead, this Court should clarify that, under *Brown* and federal labor law, *even in the face of a purported disclaimer*, the court must still assess whether (i) the employees are functioning as an organization or association seeking better terms

and conditions of employment (*i.e.*, an inquiry about whether the "circumstances" of the disclaimer warrant the unavailability of the non-statutory labor exemption), and (ii) sufficient "time" has indeed passed since bargaining and impasse to conclude that the individual employees (not working as a group) are no longer connected to or able to negotiate collective solutions for their labor concerns (including through class action litigation).

1. The Non-Statutory Labor Exemption Should Not End Under a "Circumstance" Where a Union Merely Converts Itself to an "Association of Employees" Seeking Better Terms and Conditions of Employment

The *Brown* court determined that impasse was not the correct end-point for the exemption because "it may be manipulated by the parties for bargaining purposes." *Brown*, 518 U.S. at 246. So, too, of course, with "disclaimer," which – as made evident by the facts here – can be manipulated even more easily than impasse. The lower court recognizes as much in endorsing the union's tactics to seek better terms and employment through antitrust litigation. (*See* Memorandum Order and Opinion, Docket No. 99 ("Order") at 40.)

To be sure, the Court in *Brown* cited "decertification" as one example of possible evidence of the "collapse of the collective-bargaining process." *Id.* at 250. But a disclaimer is a substantially different, less rigorous and more easily manipulated process. In contrast to disclaimer, decertification is an NLRB-

supervised process that requires, among other things, the filing of a petition, an investigation, a hearing, a vote by secret ballot and a one-year bar to the union's re-certification.[3] Needless to say, no such actions were undertaken here; moreover, the "circumstances" would not materially change if the resulting "association" was still collectively pursuing tactics, through litigation, to obtain better terms and conditions of employment (and standing at the ready to switch back to a union when a deal becomes achievable).

Here, given the district court's recognition that (i) such a conversion is a "tactic" to seek better terms and conditions of employment (through antitrust litigation), and (ii) that union status can be turned off and on like a switch, it is fair to conclude that the district court's rationale is directly contrary to the labor policy that the *Brown* court sought to safeguard. If a proper "circumstance" for ending the non-statutory labor exemption could include an immediate and unilateral conversion from union to "association" of employees – prior to the termination of the existing CBA and absent impasse between the parties – then the *Brown* inquiry would become irrelevant and the labor policy the *Brown* Court sought to protect would be eviscerated.

In an analogous collective bargaining setting, both the Supreme Court and NLRB have held that the right of an employer or employee to withdraw from a

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[3] National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(c).

multi-employer bargaining unit is not "exercisable at will or whim," but instead subject to "reasonable controls [that] limit . . . the time and manner that withdrawal will be permitted." *In re Retail Assocs., Inc.*, 120 N.L.R.B. 388, 393-95 (1958); *see also id.* at 395 (once bargaining over a new agreement has commenced, such withdrawal is not permitted "absent unusual circumstances"); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 411-13 (1982) (holding that impasse does not constitute an "unusual circumstance" for these purposes). This heightened standard reflects the "fundamental purpose of the [NLRA] of fostering and maintaining stability in bargaining relationships," *Retail Assocs.*, 120 N.L.R.B. at 393, and serves as another example of the Supreme Court's efforts to preserve the integrity of federal labor policy and the collective bargaining process before the antitrust laws can properly be interposed.

2. The Non-Statutory Labor Exemption Should Not End Simply Any "Time" a Union Announces a Disclaimer, Let Alone on the Same Day Collective Bargaining Is Taking Place

Even if the players could persuade a court that the "circumstances" warranted the termination of the non-statutory labor exemption, the timing of events still matters. For example, under the previous (and still controlling) CBA between the parties, following the expiration of any CBA, the NFL players were not permitted to disclaim union representation for at least six months' time. *See*

Article LVII, Section 3(b).[4] This built-in "cooling-off" period, which was negotiated at arm's length and specifically incorporated as part of the parties' bargain, appeared to be a timeline established and agreed to by the NFL and the NFLPA, and provides at least some indication as to those parties' understanding as to what could reasonably constitute sufficient distance in time from the collective bargaining process.

Notwithstanding the fundamental policy lessons of *Brown* as they relate to the potential manipulation of the labor process, the district court effectively holds that a union, at *any time* in the collective bargaining process, can upset this delicate balance between labor policy and antitrust law merely (and immediately) by disclaiming its union representation. As the court finds, a disclaimer "operates as an immediate trigger removing the dispute from the NLRB's jurisdictional scope . . . [and] effects a definitive and immediate renunciation of the labor law framework of collective bargaining." (Order at 46.) The court seems unconcerned that a union could engage in this tactic with the express and sole intent to use antitrust litigation to achieve the same *labor objectives* that were moments earlier the subject of collective bargaining. Under

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[4] That the Union believed it necessary to disclaim a second time (after the expiration of the CBA) further demonstrates that the original disclaimer was undertaken for strategic reasons – both to avoid the six-month waiver period and to preempt the NFL's lockout.

this myopic view of the labor laws, the district court apparently adopts a view of labor law that arms unions with the power to render the labor laws *completely irrelevant* any time the negotiations are not going their way, allowing them to turn the switch back on as a union once the threat of antitrust liability has done its job. (*See* Order at 13-14, 35, 47 (recognizing that the "association" of players can (and in fact has in the past) voted to reconstitute themselves as a union at their discretion).) This selective use of both the labor and antitrust laws is not the balance that the *Brown* Court had in mind, and it certainly does not promote the labor policy that strongly favors negotiated solutions – within the framework of the federal labor laws – concerning terms and conditions of employment.

III. THE DISTRICT COURT'S FAILURE TO APPRECIATE LABOR POLICY LEADS TO AN IMPROPER APPLICATION OF LABOR LAW

By failing to recognize the fundamental policy implications of the dispute before it, the lower court also side-steps critical issues of labor law that help make the collective bargaining process work. In particular, the court: (1) fails to address the importance of lockouts and strikes to the labor process, (2) ignores the NLA's express prohibition against enjoining both lockouts and strikes, and (3) does not address the fact that, as a matter of policy, the antitrust laws must be displaced when employees challenge a legitimate lockout as an antitrust violation.

A. Courts Have Permitted Strikes and Lockouts to Proceed Without Interference from the Antitrust Laws

It is well recognized that "[m]ultiemployer bargaining is a very common practice throughout the United States and literally involves millions of employees and thousands of employers." *Williams*, 45 F.3d at 688. Moreover, not only are economic weapons – such as lockouts and strikes – the perfectly lawful workhorses of labor disputes over terms and conditions of employment,[5] the courts have been clear that these labor battles should be conducted without allowing employees the ability to use the threat of antitrust liability as a lever to achieve their labor objectives.

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[5] As described by the Supreme Court, "[t]he presence of economic weapons [such as a lockout] in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner Act and Taft-Hartley Acts have recognized." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960); *see also Brown*, 518 U.S.at 243-44 (1996) (noting that "unit-wide lockouts" are examples of "certain tactics that this Court has approved as part of the multiemployer bargaining process"); *Buffalo Linen*, 353 U.S. at 92-93 ("The unqualified use of the term 'lock-out' in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawful [sic] resort to the lockout as an economic weapon."); *Williams*, 45 F.3d at 691 (employers, including sports leagues, may "resort to economic force, including lock-outs, in support of their demands"); *see also id.* (employers may "'use the economic weapons at their disposal to attempt to secure [its bargaining] aims'" (quoting *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981))); *Powell II*, 930 F.2d at 1302 ("[F]ederal labor laws provide the opposing parties to a labor dispute with offsetting tools, both economic and legal, through which they may seek resolution of their dispute. A union may choose to strike the employer, and the employer may in turn opt to lock out its employees.").

Here, however, the district court turns this guiding policy principle completely on its head, literally inviting unions or other employee associations to invoke the antitrust laws any time they are not having their way in negotiations and, notably, even before the standard economic weapons of labor disputes can be properly and lawfully employed. This completely and improperly elevates the tactical use of antitrust litigation over strikes and lockouts as economic tools for reaching negotiated terms and conditions of employment.

B. The District Court's Reading of the Norris-LaGuardia Act Undermines Federal Labor Policy

In order to reach its result, the district court pronounces the novel legal conclusion that the NLA does not apply to an "association of employees" who are challenging a lockout that in fact grew directly out of a labor dispute. The court cuts these issues short by finding that the NLA only applies to unions – a proposition that the court reads *into* the statutory language. (*See* Order at 58 n.43 ("But the phrase 'employees or associations of employees' does not mean 'individual non-union employees or unions.' It is better understood to mean that a 'labor dispute' includes all disputes between an employer and either a union (which is one form of an 'association of employees') or an 'individual unionized employee or employees. . . .'").)

As described below, the court's ruling is both incorrect as a matter of statutory construction and labor policy. Further, once the application of the NLA is recognized, as a matter of law it was incorrect for the lower court to have enjoined the NFL's lockout.

1. Section 13(a) of the Norris LaGuardia Act Is Not Limited to "Unions"

In order to preserve the give and take of the collective bargaining process, including the resort by labor and management to economic weapons, courts, including the Supreme Court, have universally held that the definitions provided in Section 13 of the NLA (29 U.S.C. § 113) ("Section 13") – for example, the definition of "labor dispute" in Section 13(c) – should be broadly construed. *See, e.g., Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 441 (1987) ("We reject these narrow constructions of § 13(c) . . . [and] have long recognized that 'Congress made the definition [of "labor dispute"] broad because it wanted it to be broad . . . ." (alterations in original) (citation omitted)); *Powell I*, 690 F. Supp. at 814 ("The term 'labor dispute' is defined broadly in the statute . . . .").

In this context, the application of the NLA, specifically Section 13(c), does not even require a direct employer-employee relationship. *Marine Cooks & Stewards v. Pan. S.S. Co.*, 362 U.S. 365, 370 (1960) ("[I]t is immaterial under the

[NLA] that the unions, [employees and employer] did not 'stand in the proximate relation of employer and employee.'" (citation omitted)); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 560-61 (1938) ("[The definition is] intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers."). Nor is the presence or absence of a formal union dispositive in determining whether the controversy constitutes a "labor dispute." *See, e.g., id.* at 555 (finding that the case involved a "labor dispute" even though "[t]he relation of employer and employees does not exist between the respondent and the petitioners or any of them"); *see also Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 194-95 (8th Cir. 1994) ("Courts have routinely found that a labor dispute exists in situations which do not involve any organizing activities by a union.").

In light of the principle that the provisions of the NLA should be read broadly, it is particularly incongruous for the district court to limit the application of the NLA solely to disputes involving unions. First, Section 13(a) itself defines the NLA, without qualification, as applying to any "*associations of employees*." 29 U.S.C. § 113(a) (emphasis added). Second, the NLRA employs a definition of "labor organization" that also encompasses more than unions. Section 2(5) of the NLRA defines a "labor organization" as "*any organization of any kind*, or any

agency or employee representation committee or plan, *in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning . . . wages, rates of pay, hours of employment, or conditions of work*." 29 U.S.C. § 152(5) (emphasis added). Thus, it is well settled that a collection of employees need not be formally unionized to be properly deemed a "labor organization" and a participant in some form of bargaining with employers. *See, e.g.*, *NLRB v. Omaha Bldg. & Constr. Trades Council*, 856 F.2d 47, 50 (8th Cir. 1988) (finding that trades council that met with employers was "labor organization"); *NLRB v. Philamon Labs., Inc.*, 298 F.2d 176, 178-79, 181 (2d Cir. 1962) ("committee of employees" that met once with management deemed "labor organization").

Given the statutory language of the NLA, coupled with the analogous definition of a "labor organization" in the NLRA, it was erroneous as a matter of law to enjoin a lockout merely because a union has disclaimed its status in favor of becoming an "association of employees" – a category explicitly covered under Section 13(a) of the NLA. The fact that, here, the new association of player-employees is working together – through antitrust litigation – to achieve better wages and conditions of employment further suggests that it is a labor

organization as defined under Section 2(5) of the NLRA – which surely should suffice to make it an "association of employees" under Section 13(a) as well.[6]

2. The NLA Bars Injunctions Against Lockouts

Once it is established that this case involves or grows out of a labor dispute (in part because the current "association" of NFL employees is captured under Section 13), it is clear that the NLA, as a general matter, applies to lockouts. The NLA's broad anti-injunction provisions and underlying policy goals have consistently been held to apply with equal force to injunctions sought against employees and employers. *See, e.g.*, *Clune*, 214 F. Supp. at 528 (The NLA "appl[ies] to injunctions sought against employers as well as to injunctions sought against employees or labor unions."); *United Tel. Workers v. W. Union Corp.*, 771 F.2d 699, 704 (3d Cir. 1985) ("[T]o serve the broad congressional purpose the strict requirements of the [NLA] apply to controversies . . . where labor organizations seek injunctions against employers, as well as to cases where the parties stand on an opposite footing."); *Textile Workers Union v. Lincoln Mills of*

[6] Indeed, NFLPA Executive Director DeMaurice Smith filed an appearance in this case on behalf of the *Brady* plaintiffs. (See Docket No. 53).

Ala., 353 U.S. 448, 458-59 (1957) (applying NLA standards to request for injunction to compel employer to arbitrate).[7]

Moreover, courts have used the NLA to evaluate the propriety of injunctive relief involving lockouts. *See AT&T Broadband, LLC v. Int'l Bhd. of Elec. Workers*, 317 F.3d 758, 760 (7th Cir. 2003) ("Yet a strike or lockout, like arbitration, may arise from a labor dispute, and this connection brings both within the scope of § 1 [of the NLA]."); *Dist. 29, United Mine Workers v. New Beckley Mining Corp.*, 895 F.2d 942, 945 (4th Cir. 1990) (because "lockouts by management" constitute an "action closely related to striking," the NLA applies); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972) ("The fact that this case involves an injunction against the employer does not mean that the District Court was free to ignore the procedural mandates set forth in § 7 [of the NLA] . . . .").

Within the context of the general application of the NLA to lockouts, it is ineluctable that Section 4 of the NLA, 29 U.S.C. § 104 ("Section 4"), itself

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[7] The legislative history of the NLA also supports such an application. *See* S. Rep. No. 72-163, at 19 (1932) ("[The] prohibitive sections of [the NLA] appl[y] both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees."). Courts have also concluded that Section 20 of the Clayton Act, 29 U.S.C. § 52, which contains language very similar to that found in Section 4 of the NLA, was "phrased in an evenhanded

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bars injunctions against employer lockouts just as much as against employee strikes. The statutory language mentions neither: Section 4 identifies certain acts that are not subject to injunction, including "[*c*]*easing or refusing to . . . remain in any relation of employment*." 29 U.S.C. § 104(a) (emphasis added). Moreover, Congressional action and case law both indicate that lockouts such as the one implemented by the NFL are contemplated by and fall within this section of the NLA and thus, cannot be enjoined. Specifically, in 1947, the Labor Management Relations Act ("LMRA") was passed, authorizing *as an exception to the NLA* the President of the United States to move to enjoin a "threatened or actual strike *or lockout*." 29 U.S.C. § 176 (emphasis added). By including lockouts in the category of actions subject to the LMRA, *and thus not subject to the NLA in specific instances,* Congress clearly signaled its own belief that the NLA (and its anti-injunction framework) applied to that employer activity. *See also Chi. Midtown Milk Distribs., Inc. v. Dean Foods Co*., No. 18577, 1970 WL 2761, at *1 (7th Cir. July 9, 1970) (per curiam) (finding that, because the lockout involved or grew out of a labor dispute within meaning of NLA, the district court was "precluded by law" from issuing an injunction).

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fashion to protect employer conduct in labor disputes as well as that of unions." *Williams*, 45 F.3d at 689.

In sum, based on the requisite liberal interpretation of the reach of the NLA, the lower court should have concluded that the disclaimer did not remove the association of player-employees from the coverage of the labor laws. Moreover, there can be no dispute that the lockout grew out of a labor dispute, which, by the terms of the NLA itself, should have precluded the district court's injunction of this essential labor tool.

C. As a Matter of Labor and Antitrust Policy, a Lockout Cannot Serve as an "Unlawful Act" for an Injunction under the NLA

Should the Court address the application of the NLA and, *arguendo*, find that Section 4 does not apply to bar the injunction of a lockout, the Court must still address whether Section 7 of the NLA can apply to a labor lockout as a matter of law. As a matter of policy it cannot. Section 7 requires, *inter alia*, an "unlawful act" by the enjoined party. However, under the doctrine of implied repeal as recently elucidated by the Supreme Court, a legitimate labor device such as a lockout cannot simultaneously serve as the requisite "unlawful act" for purposes of Section 7. Thus, even if Section 4 did not apply to bar an injunction of a lockout, the court would have been unable to meet the requirements of Section 7 for the grant of preliminary injunctive relief.

1. An Asserted Antitrust Violation Cannot Be the "Unlawful Act" Required By Section 7

As a threshold matter, it is well established that an alleged Sherman Act violation is not the type of "unlawful act" justifying an injunction under the NLA. *Utils. Servs. Eng'g, Inc. v. Colo. Bldg. & Constr. Trades Council*, 549 F.2d 173, 177 (10th Cir. 1977); *see also Burlington N. Santa Fe Ry. v. Int'l Bhd. of Teamsters Local 174*, 203 F.3d 703, 712 n.12 (9th Cir. 2000) ("[t]he [Act] bars injunctive relief in labor disputes even when the union's actions violate the antitrust laws."); *Garner Constr., Inc. v. Int'l Union of Operating Eng'rs, Local 302*, No. C07-0775MJP, 2007 WL 19911197, at *3 (W.D. Wash. July 9, 2007) (Act applies even in context of alleged antitrust violation by employer).[8] Instead, the "unlawful acts" contemplated by the NLA are limited to those that breach the peace or involve violence, intimidation, vandalism or other destruction of property. *See Marine Transp. Lines, Inc. v. Int'l Org. of Masters*, 770 F.2d 1526, 1530 (11th Cir. 1985) ("unlawful acts" include violence, threats, and criminal acts); *Scott v. Moore*,

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[8] *See also H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981) ("While the [NLA's] bar of federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes."); *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 103 (1940) ("For us to hold, in the face of this legislation, that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged

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680 F.2d 979, 986 (former 5th Cir. 1982) ("unlawful acts" include intimidation, and vandalism), *rev'd on other grounds sub nom., United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983). Thus, even without considering the doctrine of implied repeal, a lockout that is alleged to be a Sherman Act violation cannot be viewed as the "unlawful act" for Section 7 purposes.

2. Permitting a Lockout to Serve as an "Unlawful Act" Would Violate the Implied Repeal Doctrine

In any event, under more recent implied repeal law, a lockout – a legitimate and lawful labor tactic taken in response to a pre-impasse disclaimer in the midst of collective bargaining – cannot constitute an "unlawful act" for the purposes of issuing an injunction under Section 7. Under the standard set forth in Supreme Court's decision in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) ("*Billing*"), implicit repeal of the antitrust laws in certain contexts is necessary where the application of such laws would be "clearly incompatible" with an existing regulatory scheme, rules or laws, *id.* at 285, and where "allowing an antitrust suit to proceed . . . would present 'a substantial danger that [Defendants] would be subjected to duplicative and inconsistent standards.'" *Id.* at 274 (quoting *United States v. NASD, Inc.*, 422 U.S. 694, 735 (1975)); *see also Gordon v. NYSE*,

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violations of the Sherman Act are involved, would run counter to the plain mandate of the act and would reverse the declared purpose of Congress.").

Inc., 422 U.S. 659, 689 (1975) (noting the danger of "conflicting standards"); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411-12 (2004) ("[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." (alteration in original) (citation omitted)).

In the particular case of labor law – where courts have advised that antitrust laws should not function to "'subvert fundamental principles of our federal labor policy,'" *Williams*, 45 F.3d at 690 (quoting *Wood v. NBA*, 809 F.2d 954, 959 (2d Cir. 1987)); *Brown*, 518 U.S. at 250 (scope of non-statutory labor exemption meant to ensure that "antitrust intervention would not significantly interfere with [the collective-bargaining] process") – the application of *Billing* and *Trinko* to any consideration of Section 7 is fairly straightforward. As one of many tools and tactics available to unions and management in a collective bargaining context, lockouts are vital to the "efficient functioning of the . . . market[]," *Billing*, 551 U.S. at 283, and are one type of economic weapon the NFL is lawfully entitled to implement. In that case, any finding that the lockout also constitutes as an "unlawful act" for purposes of Section 7 would, under *Billing* and *Trinko*, create a "plain repugnancy" between the labor and antitrust laws. As such, if Section 7 were to come into play – *i.e.*, if the NLA applied, but Section 4 did not itself bar

injunctive relief – there is no question that the court could not rely on the lockout as an unlawful act to justify an injunction.

CONCLUSION

For the reasons set forth above, the District Court's issuance of the injunction should be reversed.

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Respectfully submitted,

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